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CHARLES ELMORE

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929.

No. 5.

JOHN JOHNSON,
Petitioner,

—against—

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,
Respondent.

No. 32.

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, sued in the name of the United States Shipping Board Emergency Fleet Corporation, and CONSOLIDATED NAVIGATION COMPANY, INC.,
Petitioners,

—against—

BENJAMIN LUSTGARTEN, an infant, by his guardian *ad litem*, JOHN A. LYDECKER,
Respondent.

BRIEF ON BEHALF OF JOHN JOHNSON AND BENJAMIN LUSTGARTEN.

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BRIEF ON BEHALF OF JOHN JOHNSON AND BENJAMIN LUSTGARTEN.

The Order of This Court Made With Respect to the Argument of Defenses of Fleet Corporation.

Following the argument of the *Johnson* case on February 21, 1929, during the argument of which references were made to the then pending petition for certiorari in the Supreme Court in the *Lustgarten* case, this Court on

April 8, 1929, made the following order, reported in the *U. S. Supreme Court Journal,* 1929, page 234, and *American Maritime cases,* No. 4, April, 1929, cover page:

> "No. 220. John Johnson, petitioner, vs. The United States Shipping Board Emergency Fleet Corporation, 1928 A. M. C. 987, certiorari granted, Oct. 8, 1928. This cause is restored to the docket for reargument and is set down for hearing with No. 676, United States Shipping Board Emergency Fleet Corporation vs. Lustgarten, the two cases to be argued as one. The Court especially invites argument on the following questions:
>
> 1. Is the United States Shipping Board Merchant Fleet Corporation, as an agency of the United States, immune from suit for the tortious acts of persons whom it has employed to carry on the operation of merchant vessels of the United States, and who have been selected by it with due care?
>
> 2. Are the remedies given against the United States Shipping Board Emergency Fleet Corporation by the Suits in Admiralty Act of March 9, 1920, exclusive of all other remedies, whether at law or in admiralty, for liabilities of the Fleet Corporation growing out of the operation of merchant vessels of the United States?
>
> 3. Is the two-year period of limitation prescribed in the Suits in Admiralty Act applicable to the present suit?"

Decisions of Lower Courts.

The opinion of the Circuit Court of Appeals for the Second Circuit in case No. 5, is reported in *Johnson* v.

United States Shipping Board Emergency Fleet Corporation, 24 F. (2d) 963 (1928), and is copied in the record of this case as filed in this Court, at page 184. This opinion states nothing with reference to the three defenses upon which argument has been requested, largely because neither in the briefs nor in the oral argument in the Circuit Court of Appeals was any reference made by the attorneys for the Fleet Corporation to these defenses.

The opinion of the Circuit Court of Appeals for the Second Circuit, in case No. 32, is reported in *Benjamin Lustgarten, an infant, his guardian ad litem, John A. Lydecker, defendant-in-error (plaintiff below) v. United States Shipping Board Emergency Fleet Corporation*, and *Consolidated Navigation Company, Inc.*, plaintiffs-in-error (defendants below), 28 F. (2nd) 1014 (1928), and is copied in the record of this case as filed in this Court, on page 188. The first, but not the second or third defenses above mentioned, was the subject of a pointed argument in this case; the Court, Judges Manton, Swan and Augustus N. Hand sitting, denied such defense and affirmed the judgment below in a per curiam opinion.

Jurisdiction of the Court.

The judgment of the Circuit Court of Appeals, reviewed in the *Johnson* case, No. 5, was entered March 26, 1928 (R. 185). A petition for certiorari was filed on June 22, 1928, and an order allowing certiorari was entered October 3, 1928.

The judgment of the Circuit Court of Appeals to be reviewed in the *Lustgarten* case, No. 32, was entered November 5, 1928 (R. 356). A petition for certiorari was filed February 28, 1929, and an order allowing certiorari was entered March 5, 1929 (R. 189).

The Questions Presented.

JOHNSON CASE.

With respect to the *Johnson* case, this brief will discuss all three questions upon which the Court has invited argument, together with the *Lustgarten* case.

The question upon which the writ of certiorari was sought in the *Johnson* case, to wit, whether in a suit at law for a maritime tort, contributory negligence is a bar to a recovery, we understand from the order of the court, made April 8, 1929, was decided in favor of the petitioner, Johnson, and we therefore rest this question upon the argument contained in our brief in support of the writ of certiorari, and filed in February prior to the argument of this case, and do not reprint here our argument upon that question or the specification of error which it covered.

With respect to the argument of these three questions as they apply to the *Johnson* case, we do not wish to be considered as abandoning our objection made upon the previous argument of the *Johnson* case in this Court on February 21, 1929, to the effect that these objections were not properly before the Court and had been waived, and we shall therefore include an additional point which will consider our objections to the assertion of these defenses.

LUSTGARTEN CASE.

We shall consider the first two of the questions stated by the Court, as applying to the *Lustgarten* case, together with the *Johnson* case.

We do not wish to be considered as conceding that

the second of these questions, to wit, that of exclusive jurisdiction under the Suits in Admiralty Act, is properly before the Court.

This case having been begun within the two-year limit, is not directly concerned with the third defense.

We shall consider our objections to the assertion here of the defense presented in the second question stated by the Court, with our objections to the assertion of the first defense together with the *Johnson* case.

In addition to the three questions stated by the Court, and the question as to whether certain of the defenses are properly before the Court, we shall also consider as part of the first question the question presented in Specification of Error No. 2, as involving the question of ownership *pro hac vice* and consequent liability on the part of both the Fleet Corporation and the Consolidated Navigation Company, Inc.

We shall not argue the questions presented in the Specification of Errors in the *Lustgarten* case, Numbers 1 and 4, because no argument was made upon these points in the brief in support of the writ of certiorari. We do not concede that the questions presented in the Specification of Errors Numbers 1 and 4 are properly before the Court, and believe that they are not worthy of argument anyway.

Statements of the Cases.

JOHNSON CASE.

The *Johnson* case is an action for personal injuries brought at common law in the Supreme Court of New York (R. 2), and removed because of a diversity of citizenship to the United States District Court for the Eastern District of New York (R. 4). Johnson states that he was asked by the boatswain of the SS. "Jackson-

ville" to go on board the SS. "Jacksonville," which was in the harbor of Jacksonville, Florida, taking oil (R. 106) to see the ship's officer with respect to signing on as a carpenter or handyman (R. 33).

Johnson failed to find the ship's officer on the boat (R. 11 and 12) and started to return to his hotel, crossing the gangplank between the SS. "Jacksonville" and the SS. "West Compo", which latter vessel was between the SS. "Jacksonville" and the dock (R. 9 and 10), when the gangplank swung to one side, pitching Johnson into the narrow water space between the two ships (R. 12) from which Johnson sustained numerous and serious injuries (R. 12, 13, 18, 19, 21, 62, 63, 64). Johnson stated that the gangplank was insecurely fastened; that one end of the rope-swing which held the gangplank steady had come untied (R. 36).

There was a question of Johnson's contributory negligence in using the gangplank, and the Court charged that if he was guilty of contributory negligence, that then he could not recover (R. 170, 171). Exception was taken upon the refusal to charge the Admiralty Rule of contributory negligence (178). The injury occurred August 1, 1920. A complaint was served March 29, 1923 (R. 2). The jury brought in a verdict for the defendant (178), which was affirmed (R. 184). Johnson asks for a new trial.

Lustgarten Case.

The *Lustgarten* case was brought at common law in the United States District Court for the Southern District of New York (R. 2) and is also an action for personal injuries. The appeal arises out of the second cause of action, alleging negligence in failure to supply

proper medical attention, the first cause of action having been dismissed (R. 13). Lustgarten, an infant, against his will, was compelled by the master of the ship, SS. "Coelleda" to work in the cook's galley of the SS. "Coelleda" while the ship was on the high seas, the morning following the receipt of injuries (R. 31) sustained while attempting to empty over the ship's rail a heavy can of steaming ashes (R. 74, 29, 80, 153) during a storm (R. 81, 89). At this time the ship was proceeding from Swansea, Wales, loaded with coal (R. 19). Lustgarten worked for two hours and then suffered a hemorrhage (R. 32, 37, 176). One month after receiving the injury he was found to be in a pre-tubercular condition which had proceeded to an advanced stage of tuberculosis at the time of trial (R. 122, 128). At the close of plaintiff's case, defendant's counsel moved for a dismissal upon the ground that both the Fleet Corporation and the Consolidated Navigation Company, Inc. were agents of the United States. These motions were denied with exceptions (R. 142, 143, 169). At the close of the entire case defendant's counsel moved to dismiss upon the ground of failure to establish a cause of action. This motion was denied with exception (R. 170). The jury brought in a verdict for the plaintiff in the sum of $10,000 (R, 175) which was affirmed (R. 188).

Summary of the Argument.

POINT ONE.

THERE IS NO IMMUNITY FROM SUIT ON THE PART OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, EVEN CONSIDERED AS AN AGENT OF THE UNITED STATES, FOR THE TORTIOUS ACTS OF PERSONS WHOM IT HAS EMPLOYED TO CARRY ON THE OPERATION OF MERCHANT VESSELS OF THE UNITED STATES, AND WHO HAVE BEEN SELECTED BY IT WITH DUE CARE.

I.—The acts of Congress show that there was an unmistakable intention on the part of Congress to subject the Fleet Corporation to the same laws, regulations and liabilities as private business corporations engaged in the same line of business.

II.—Even in the absence of what we regard as an express recognition on the part of Congress of the proprietary character of the business of merchant shipping the Fleet Corporation was expected to undertake, and the liabilities resulting therefrom, it would follow as a matter of law that the operation of this merchant fleet was a proprietary, rather than a governmental function. This merchant shipping business of the Fleet Corporation has been judicially recognized to be inherently of this character.

III.—There is really nothing in this question which has not been decided. We have chosen to meet the Government on its own ground of defense, based upon the nature of the work in which the Fleet Corporation is engaged because we are con-

fident of the fundamental error of this defense, but it is really *stare decisis.*

IV.—By the managing operating agreement, the Fleet Corporation made itself and the persons to whom it chartered the steamships, "Jacksonville" and "Coelleda", liable as owners *pro hac vice* for torts occurring in the operation of vessels, as the owner. The business upon which the Fleet Corporation was acting was its own business, and not the business of the United States.

V.—The Fleet Corporation is very particular to draw attention to the fact that the name of the United States is signed to the operating agreement. What the Fleet Corporation does not do is to show its authority for so signing the name of the United States to this agreement.

POINT TWO.

IT IS NOT AN EXCLUSIVE REMEDY THAT IS GIVEN AGAINST THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION BY THE SUITS IN ADMIRALTY ACT OF MARCH 9, 1929, FOR LIABILITY OF THE FLEET CORPORATION GROWING OUT OF THE OPERATION OF MERCHANT VESSELS OF THE UNITED STATES, AND DOES NOT BAR THE COMMON LAW ACTIONS INSTITUTED IN THESE TWO SUITS.

I.—The Suits in Admiralty Act should be construed in harmony with the later act of June 5, 1920, the Merchant Marine Act, and so as to sustain the present common law actions *in personam* brought against the Fleet Corporation.

II.—The right to sue the Fleet Corporation at common law with the right of trial by jury, has

been saved to the present plaintiffs by the Saving Clause in the Judiciary Act and by the *Seventh Amendment* to the *Constitution* and such a construction of the Suits in Admiralty Act which would render it unconstitutional *or even create a doubt of its unconstitutionality,* should be avoided.

III.—In the cases in which this Court has had occasion to construe the Suits in Admiralty Act, there has not been presented the point now in issue, as to whether apart from the Suits in Admiralty Act and at common law, the Fleet Corporation may be sued for its maritime torts, *nor has there been presented the question as to what has been the effect upon this Act of Section 18 of the later Merchant Marine Act.*

IV.—"The complete system of administration," although possibly a valid argument for the uniformity of the Admiralty remedy and administration provided for in the Suits in Admiralty Act, is, we submit, no argument in favor of a deprivation of a previously existing action at common law.

V.—Construed as depriving the present plaintiffs of their common right to bring a common law action for a maritime tort against the Fleet Corporation, the act should be strictly construed with reference to a deprivation of the plaintiff's present common right, and no meaning should be given to it not within its express words.

VI.—The maintenance of the present actions does not conflict with the terms of the Suits in Admiralty

Act. The plaintiffs have not asked for process against the vessels of either the United States or the Fleet Corporation.

VII.—In view of the organization of the Fleet Corporation as a private corporation with proprietary duties to perform, and its consequent liability as explained in Point One, it is not to be presumed that the only remedy by which such liabilities may be adjusted is a libel *in personam*, under the Suits in Admiralty Act. No other private corporation in the same line of business would be so restricted.

POINT THREE.

THE TWO YEAR PERIOD OF LIMITATIONS PRESCRIBED IN THE SUITS IN ADMIRALTY ACT IS NOT APPLICABLE TO THE LAW ACTION IN THE JOHNSON CASE.

I.—Assuming that the Suits in Admiralty Act is not exclusive of the common law remedy saved to suitors under the Judiciary Act, the two-year period of limitation by its express terms would not be applicable to the Johnson action.

II.—The lower court of common law in trying the action which Johnson had brought under the Saving Clause, and at common law, was required to apply only the substantive and not the procedural maritime law. The two-year period of limitations was procedural and not substantive maritime law.

POINT FOUR.

NONE OF THE DEFENSES WITH RESPECT TO THE JOHNSON CASE NOR THE DEFENSE OF THE EXCLUSIVENESS OF THE REMEDY UNDER THE SUITS IN ADMIRALTY ACT AS IT APPLIES TO THE LUSTGARTEN CASE, IS PROPERLY BEFORE THIS COURT FOR ARGUMENT.

I.—Counsel for the Fleet Corporation themselves seemed to have regarded these three defenses as of no importance in the lower courts and thus we have an almost complete lack of proof in this court upon which to base an intelligent discussion. The court is limited by the record.

II.—No motions and no request to charge and no exceptions to rulings were made with respect to these defenses.

POINT ONE.

THERE IS NO IMMUNITY FROM SUIT ON THE PART OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, EVEN CONSIDERED AS AN AGENT OF THE UNITED STATES, FOR THE TORTIOUS ACTS OF PERSONS WHOM IT HAS EMPLOYED TO CARRY ON THE OPERATION OF MERCHANT VESSELS OF THE UNITED STATES, AND WHO HAVE BEEN SELECTED BY IT WITH DUE CARE.

I. The acts of Congress relating to the conduct of the Merchant Fleet enterprise show that there was an unmistakable intention on the part of Congress to subject the Fleet Corporation to the same laws, regulations and liabilities as private business corporations engaged in the same line of business.

When Congress, in 1916, found it necessary to provide for the acquisition by the Government of a large fleet of merchant vessels, it adopted a definite policy to which it has firmly adhered. It authorized the Government to carry on their activities through a business stock corporation, providing that the Shipping Board, on behalf of the United States, might subscribe to all or a majority of the stock of such corporation, and that with the approval of the president it might sell any or all of the stock provided that it should never be a minority stockholder. "It contemplated private persons as stockholders," [*Sloan Shipyards* v. *Fleet Corporation*, 258 U. S. 549, 565 (1922)], which signifies that it also contemplated the conduct of such business for profit and the distribution of profits among the stockholders.

The formation of such a stock corporation was authorized by the Shipping Act, 1916, to be made under the

laws of the District of Columbia. Pursuant thereto, the United States Shipping Board Emergency Fleet Corporation was so organized as a business corporation with a capital stock of $50,000,000. The charter thereof stated: "the object for which it is formed is the purchase, construction, equipment, lease, charter, maintenance and operation of merchant vessels in the commerce of the United States, and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of such business as authorized by the laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia, upon corporations under said sub-chapter four of the corporation laws of the District of Columbia." [Appendix, p. 1].

The fact that the stock was entirely subscribed by the United States did not alter its character, for it was contemplated that the stock might be sold to private persons. This was the instrumentality selected by the Government because it was recognized that the business to be conducted was a vast commercial enterprise.

One of the powers of the corporation under the laws of the District of Columbia was the "capacity to sue and be sued." [*Sloan Shipyards* v. *Fleet Corporation,* 258 U. S. 549, 565 (1922)].

The Fleet Corporation under this act has been operated as a strictly business corporation, its financial transactions being carried on strictly in accordance with commercial practice, rather than as a governmental unit. [*Skinner & Eddy* v. *McCarl,* 275 U. S. 1, 7 (1927)].

If the enterprise were required to be carried out by the instrumentality of such a corporation, it would seem-

ingly have been unnecessary to make further provision to indicate that the operation of the merchant fleet should be subject to the same liabilities as the operation of similar vessels by private persons. [*Sloan Shipyards* v. *Fleet Corporation, (supra,* page 570)]. But the Shipping Board was not required by the Act to use such a corporation and Congress desired to leave no doubt that, no matter how such enterprise was conducted, the same rules should apply with respect to the operation of such vessels and, therefore, specifically provided that the vessels to be operated, whether owned by the United States or not, should be "subject to all the laws, regulations and liabilities of merchant vessels". [*Section 9, Shipping Act, 1916, U. S. Code, Title 46, Sec. 808*].

Thus it was made clear that the ships so operated by the Fleet Corporation were subject to all such liabilities, and subsequently it was found that the ships of the merchant fleet were being arrested and seized, and that there was no speedy remedy for their release. No special provision had been made for the furnishing of bonds for the release of such ships. [*House Report,* No. 223, Appendix p. 8; *Remarks of Senator Jones,* Appendix, p. 10; *The Lake Monroe,* 250 U. S. 246, (1919)].

To avoid this embarrassment and the consequent delay and expense, Congress then passed the Suits in Admiralty Act, exempting such ships from arrest and seizure, and authorizing in lieu thereof a suit in admiralty directly against the United States or against the corporation by libel in personam, whenever, if any such vessel was privately owned or operated, or the cargo thereof privately owned or possessed, a proceeding in admiralty might have been maintained. [Section 2 of the Act].

After the War, Congress abandoned the purpose of selling stock in the Fleet Corporation and instead determined that it should, as soon as possible without loss, dispose of the ships of the Emergency Fleet, and passed the Merchant Marine Act in 1920. [Section 5]. Provision was made that the steamship lines theretofore established should be maintained "until in the opinion of the Board, the maintenance thereof is unbusinesslike and against the public interest". [Section 9]. While the Act directed the transfer of a title to the ships to the United States, nevertheless, it provided that their operation and sale should be conducted by the Shipping Board or the Fleet Corporation. The charter of the Fleet Corporation remained unchanged, the first change being made in 1927 when merely the name was changed to United States Shipping Board Merchant Fleet Corporation. [*U. S. Code, Title 46, Section 810a*].

Notwithstanding the passage of the Suits in Admiralty Act approved March 9, 1920, it seems that Congress desired to give further assurance to persons dealing with the Fleet Corporation, that all such persons should have the same protection as if dealing with a private person operating merchant ships, and reenacted the provisions of Section 9 of the Shipping Act of 1916, that "such vessels, while employed solely as merchant vessels, shall be subject to all the laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein as owner in whole or in part, or hold any mortgage, lien or other interest therein". [*Section 18, Merchant Marine Act*, approved June 5, 1920; *U. S. Code, Title 46, Section 808*].

These enactments seem definitely to dispose of this question. Congress must be presumed to have well under-

stood the distinction made in law between the liability of a quasi-public corporation for the negligence of its employes, if such corporation is engaged in carrying on a private or proprietary rather than a public function, and it has endeavored, through these enactments, to make it clear and definite that the operation of the merchant fleet should be regarded as a private and proprietary function.

The liability of a quasi-public corporation, such as the Fleet Corporation, acting in its private and proprietary capacity, for the negligence of its employees, is a principle of law which has been firmly established through the authority of this court and the highest courts of many states. [*Fleet Corporation* v. *Sullivan*, 261 U. S. 146 (1922); *Hopkins* v. *Clemson College*, 221 U. S. 636, 647 (1921); *Weightman* v. *Corporation*, 66 U. S. 39 (1861); *Richmond* v. *Warehouse Corporation*, 148 Va. 60, 70 (1927); *Gibson* v. *Pryor Brown Transfer Co.*, 290 S. W. 33 (Supreme Court of Tenn. 1926); *Central R. R. & Banking Co.* v. *Lampley*, 76 Ala. 357, 366 (1884); *United States* v. *Atlantic Coast Line R. R.*, 215 Fed. 56, 59 (C. C. A., 4, 1914); *McQuillin on Municipal Corporations*, Section 2792; *Story on Agency*, Section 308].

The intent of Congress in passing the Shipping Act of 1916 to render the operation of the Emergency Fleet when used as commercial vessels subject to the same laws as pertained to the operation of merchant vessels by private persons, seems fairly clear, but there is stronger evidence of a like intent on the part of Congress in passing the Merchant Marine Act in 1920. The situation ex-

isting at the time Congress legislated in 1920 [*United States* v. *Anderson*, 9 Wall. 56, 65 (1869)], appears in its debates and help to explain its purposes. This statute, known as the *Merchant Marine Act*, or *Jones Act* (41 Stat. 988-1008) substantially revised the *Shipping Act of 1916*.

In brief, these circumstances referred to in these debates were:

(1) The close of the War leaving the United States in ownership and possession of a great fleet of ships acquired for War purposes, but not suitable for naval vessels;

(2) The destruction of the World commerce carried on by the ships of Germany and Austria and the "golden opportunity" of the United States to regain the leadership in overseas commerce which it had in the clippership era;

(3) The disastrous failure of the government in its operation of the railroads;

(4) The crushing burden of indebtedness (over three and a half billions of dollars) which had been incurred by the merchant fleet enterprise.

After many conferences and reports involving a legislative history, extending from November 5, 1919 to June 5, 1920, (see history of Merchant Marine Act Appendix, page 3), the Merchant Marine Act was evolved, showing plainly that the United States was in the "shipping business" in a big way without wanting to be in it, and that it was taking that which seemed to be the best way of getting out of this business with the least amount of financial loss and with a prospect of financial profit to the Government and to the people of the United States.

The purposes motivating the regulation of the Fleet Corporation were still private and proprietary, and even more so than in the beginning in 1916 when it was organized. We call particular attention to Sections 1, 5, 7 and 14 of this latter act, the Merchant Marine Act.

By an indirection it is stated in Section 12 that the policies and purpose of the act are declared in Sections 1 and 5. Section 1, to start with therefore, declares that it is necessary to have a merchant marine to "serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States".

The Government doubtless would emphasize the first part of this clause down to "ultimately".

We emphasize the latter part of the sentence and call attention to the fact that if there is any inconsistency, the latter part of the sentence being later in point of time governs. [*Frost* v. *Weenie,* 157 U. S. 46, 58 (1894); *Lewis Sutherland Statutory Construction,* 2nd Ed. Sec. 349].

Section 5 refers to the sale, rather than to the operation of the vessels, but shows perhaps better than any other section, the commercial purpose of the act. Here it is stated what facts the Shipping Board shall take into consideration in selling the vessels and concludes with "and any other facts or conditions that would influence a prudent solvent business man in the sale of similar vessels or property which he is not forced to sell".

Section 7 provides for the maintenance of steamship lines until "in the opinion of the Board the maintenance thereof is *unbusinesslike* and against the public interest".

Section 14 provides for the covering of net proceeds into the Treasury of the United States as miscellaneous receipts, and also authorizes the Board to withdraw the investments made by the Government during the War in emergency and cover the net proceeds into the Treasury of the United States.

There can be no doubt from these sections of the Merchant Marine Act that the Government not only expected the Fleet Corporation to make a profit while proceeding with the orderly liquidation of its shipping interests, but also to retrench those expenditures made during War time. These sections show that the Legislature intended that the Fleet Corporation was to function as a strictly private and commercial business, and like any other business corporation, was to have the businessman's point of view.

The private purpose of the Fleet Corporation was specifically recognized in a report submitted about a year following the passage of the Merchant Marine Act by the Select Committee on United States Shipping Board operations. (See extract from this report in Appendix, page 8).

On pages 28 and 33 of the Government's brief, an argument is made under Section 8 of the Suits in Admiralty Act that the provision for payment of decrees against the Fleet Corporation with public money supports the Government's theory that the Fleet Corporation is a public agent and that the activities of the Fleet Corporation are also public, which seems to us to be a wholly erroneous and narrow interpretation of this section.

With the change of purpose affected by the Merchant Marine Act of 1920 from a sale of the stock of the Fleet

Corporation to a sale of the ships operated by the Fleet Corporation and the covering of the proceeds into the Treasury of the United States, it was necessary to free the ships of all liens, in order to make efficacious the prompt sale of the ships. The proceeds of the sales, which represented the ships, as well as the proceeds of the operation of the ships, were to be covered into the Treasury of the United States and it was therefore only logical that the payment of judgments arising out of the operation of the ships should be paid from the same repository as that into which were covered the proceeds of such sales and operation.

The section specifically states that the judgments shall first be payable out of any "appropriation or insurance fund or other fund especially available therefor".

It was not properly public money, but rather Fleet Corporation or ship money, which was to go to pay these judgments.

It seems to us that this suggestion of the Government is without significance when it is borne in mind that Congress knew at the time of the passing of the Merchant Marine Act of 1920 that the operation of these ships had been carried on by a private corporation. It had just been passing legislation to relieve the ships from the seizure to which they were subject by reason of the fact that they were operated by such a private corporation, and notwithstanding that fact they made no effort to change that relationship or to change the manner of operating the vessels, but by the Merchant Marine Act authorized the continued operation of the vessels by this private corporation and re-enacted, as above stated, the provision that when operated as merchant vessels they should be subject to the same liabilities as when operated by a private person.

II. Even in the absence of what we regard as an express recognition on the part of Congress of the proprietary character of the business of merchant shipping the Fleet Corporation was expected to undertake, and the liabilities resulting therefrom, it would follow as a matter of law that the operation of this merchant fleet was a proprietary, rather than a governmental function. This merchant shipping business of the Fleet Corporation has been judicially recognized to be inherently of this character.

To sum it up briefly, we find the courts referring to the government's shipping industry carried on by the Fleet Corporation as:

> "Her service at the time was purely commercial".
>
> [Page 256, Mr. Justice Pitney, in *The Lake Monroe,* 250 U. S. 246 (1918)].

> A "business corporation engaged * * * in * * * a private enterprise."
>
> [Judge Cardozo at page 383, in *Cox* v. *Lykes Bros.,* 237 N. Y. 376 (1924)].

> "Functioning as a great industrial business corporation".
>
> [*Haines* v. *Lone Star Ship Building Co.,* 268 Pa. 92, 100 (June 26, 1920)].

> "The object for which the corporation is created is a matter of private business".
>
> [*Chase National Bank* v. *Fleet Corporation,* 294 Fed. 641, 648, (C. C. A., 2, 1923)].

> "Enters the domain of business and commerce such as operating merchant vessels".
>
> [*United States* v. *Miller,* 28 F. (2nd), 846, 850 (C. C. A., 8, 1928)].

"The business of the Fleet Corporation was not particularly governmental in its nature but was commercial and industrial".

[*Fleet Corporation* v. *Wood*, 274 Fed. 893, 899 (C. C. A., 2, June 15, 1921)].

"A purely commercial undertaking".

[*Lord & Burnham Co.* v. *Fleet Corporation*, 265 Fed. 955, 959 (D. C. N. D. Ill. 1920)].

"Enters the sphere of commercialism".

[Judge Neterer on page 385 in *United States* v. *Skinner & Eddy Corp.*, 28 F. (2d) 373 (D. C. W. D. Wash., 1928)].

"A commercial enterprise".

[*Wallace* v. *Fleet Corporation*, 5 F. (2d) 234, 236, (D. C. W. D. Wash. 1925)].

With respect to the business of other shipping corporations of other sovereignties, the same principle of the recognized private character of the business has been adopted. [*Hutchinson* v. *Western & Atlantic R. R. Co.*, 6 Heisk (Tenn.) 634 (1871); *Moore* v. *Board of Trustees*, 7 Ind. 462 (1856)].

Another corporation operating ships of which the Government has been the sole stockholder for approximately twenty years, and operating under statutory provisions which require the profits annually to be covered into the Treasury of the United States (37 Stat. 560), is the Panama Railroad Company. This corporation has been held to the liability of a private business corporation. [*Panama Railroad Co.* v. *Curran*, 256 Fed. 768 (C. C. A. 5, 1919); *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375 (1924)].

The operation of the ships, the chartering of the vessels, and the organization of shipping routes involves high qualities of iniative and resourcefulness, the characteristics of a private rather than a governmental enterprise. In keeping a check on the charters of the ships and keeping a check on the seamen that are employed, the Fleet Corporation becomes involved directly and indirectly with obligations assumed with respect to the individual, rather than to the government.

It would seem to be sufficient that the Fleet Corporation was organized under the laws of the District of Columbia under statutes relating to the organization of private corporations in general, and that there was no suggestion whatever of governmental purpose stated in its charter and that under the laws of the District of Columbia there was authority to sue and be sued.

That there was no intention on the part of Congress of any such governmental purpose is very clear from the remarks of Senator Jones, Chairman of the Senate Committee in charge of the bill in explaining its provisions before the Senate (Appendix, page 6). (History of Merchant Marine Act, Appendix, page 3.)

Without considering what might have been done, *the fact of its having been organized as a private corporation itself implies that its objects and purposes were private.* "But it was organized * * * as a private corporation." [Justice Brandeis, in *Skinner & Eddy* v. *McCarl,* 275 U. S. 1 (1927)].

Before leaving the subject of the public nature of the shipping business, we point out the defect in certain arguments in the Government's brief as not applicable to the facts of these two cases.

We recognize, of course, that the Fleet Corporation was an instrumentality of the Government of the United

States and carrying on various functions which the government deemed essential to build up an auxiliary for its naval forces, and that as such instrumentality of government, it was entitled to the benefits conferred upon the government and all of its departments and agencies by the Post Roads Act [*Fleet Corporation* v. *Western Union,* 275 U. S. 415, 421 (1928)].

But this does not alter the fact that the functions of the Fleet Corporation were of a private or proprietary nature when considered with relation to merchant shipping and the rule of law with respect to the liability of such a corporation for the negligence of its employes in the course of such work. Nor is it of importance that, in its benevolence, the government has deemed it appropriate to extend to the employes of the Fleet Corporation the benefits of the Federal Employer's Liability Act [34 Opinions of Attorney General, 363].

In the Merchant Marine Act itself (Section 33) Congress specifically stated that seamen should have the right of trial by jury in an action at law to recover damages for personal injuries, and made no exception with relation to seamen employed by the Fleet Corporation. Numerous attempts have been made to bring seamen under the compulsory compensation acts but Congress has steadfastly refused to enact such legislation.

It is equally unimportant that this Court recognized a claim by the Italian Government that ships owned and operated by it were not subject to suit and seizure. [*The Pesaro,* 271 U. S. 562 (1925)]. The question there involved was not one of substantive right, but of remedy. The question here involved is one of substantive right; that is, the liability of the Fleet Corporation for the negligence of its employees,—not the remedy for the en-

forcement of this right either by suit against the Government or by seizure of Government property.

The Fleet Corporation counsel seem to have confused the question here involved with cases involving the rules relating to public officers, citing in support of its argument, *Story on Agency,* Sec. 319, and *Robertson* v. *Sichel,* 127 U. S. 507, 517 (1887) and other authorities to the same effect, but this defense is wholly inapplicable for several reasons: (1) It applies only to individuals; (2) is intended to prevent discouragement of individuals in the Public Service unable to assume such responsibility, the embarrassment of a contrary doctrine and the prevention of demoralization of the Public Service; (3) under this doctrine the employees themselves are government officers, though of an inferior grade [*Story on Agency,* Section 321; *Meachem on Agency,* Section 1502]; whereas employees and officers of the Fleet Corporation or of the persons to whom the ships have been chartered are not officials of the United States [*United States* v. *Strang,* 254 U. S. 491, 493 (1921)]. Operating agreement, Section 7 (Lustgarten R., 178).

III. There is really nothing in this question which has not been decided. We have chosen to meet the Government on its own ground of defense, based upon the nature of the work in which the Fleet Corporation is engaged because we are confident of the fundamental error of this defense.

The defense, however, that the Fleet Corporation is not liable because the injuries received and the damage

done arose out of a public service, was decided in the negative by this Court as early as 1922 in the case of *Sloan Shipyards* v. *Fleet Corporation,* 258 U. S. 549 (1922) with respect to the second contract there under consideration.

In the brief of the Government prepared in opposition to *Johnson's* case and served at the time of the previous argument in February, 1929, the statement is made that the *Sloan* case was concerned with an instance in which the Fleet Corporation was "acting in its corporate capacity and interest, and in its own name incurred obligations", but that this is not the fact appears from the statement of the Court on page 568. Here the majority of the Court, opinion by Mr. Justice Holmes, state:

> "We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation 'representing the United States of America'. The Fleet Corporation was the contractor even if the added words had any secondary effect."

Does the Government think that they have created a legal revolution by changing the language of their contracts, reading "the Fleet Corporation representing the United States of America", ~~rather than~~, "the United States of America acting through the United States Shipping Board represented by the United States Shipping Board Emergency Fleet Corporation"? [*Lustgarten,* R. 177.]

We take it that the answer which this Court has given to this defense is simply that it was not acting

as a public agent or as an agent of the United States upon public business, but that it was acting for itself and upon its own business.

That such is the view of this court, and that the matter is now *stare decisis,* has been the opinion of other distinguished courts.

The Court of Appeals in the District of Columbia in *Fleet Corporation* v. *O'Shea,* 5 F. (2d) 123, 125 (1925) merely stated the point was not tenable, citing the *Sloan* case among numerous cases.

In *Dietrich* v. *Fleet Corporation,* 9 F. (2d) 733 (C.C.A. 2, 1925) Chief Judge Rogers writing for the court quoted the portion of the opinion of Mr. Justice Holmes in the *Sloan* case set out above and considered the point closed as to contract liability.

That this point was in issue in the *Sloan* case appears moreover from page 59 of the record in that case, (No. 28247, filed April 25, 1921). The affidavit supporting the motion of the Government, to dismiss the bill of complaint, states: "Said defendant was not acting in its own behalf as shown, but solely as the agent and instrumentality of the United States of America within the limits of its authority and the scope of its employment".

As to whether the liability in the *Sloan* case is imposed with respect to the acts of an agent of the Fleet Corporation, as distinguished from an act of the Fleet Corporation itself, the same matter of fact is, of course, presented. A corporation being a fictitious entity of the law, it cannot act except through agents. [*Barnes* v. *District of Columbia,* 91 U. S. 540, 545, (1875); *Story*

on Agency, Section 16.] The act done in the *Sloan* case must have been an act done by an agent just as in the *Johnson* and *Lustgarten* cases, and there is no distinction in the principle involved.

It is not lightly to be passed over that the injury to Lustgarten was suffered at the hands of the Captain. The Captain is not a fellow-servant with a member of the crew. He was the *alter ego* of the Fleet Corporation and the Consolidated Navigation Company. [*The Hamilton,* 146 Fed. 724, 727 (C.C.A. 2, 1906).

IV. By the managing operating agreement, the Fleet Corporation made itself and the persons to whom it chartered the steamships, "Jacksonville" and "Coelleda", liable as owners *pro hac vice* for torts occurring in the operation of vessels, as an owner. The business upon which the Fleet Corporation was acting was its own business, and not the business of the United States.

The operating agreement purports to be an agreement made between the United States as the owner, and the persons to whom the ship is chartered, called the agent, (Lustgarten R. 177). The agreement is signed by L. C. Palmer, President of the Fleet Corporation (Lustgarten R. 181). In the record he also signs as President of the Consolidated Navigation Company but this is a typographical error. We shall therefore treat this agreement as one between the Fleet Corporation on the one hand, referred to as the owner, and the Consolidated Navigation Company on the other hand, referred to as the agent.

Contracts of affreightment are of two kinds, in one of which the owner parts with possession, command

and navigation of the ship, in which case the charterer is considered as the owner for the voyage or service stipulated. [*United States* v. *Shea,* 152 U. S. 178, 187 (1893)]. *Reed* v. *United States,* 78 U. S. 591, 600 (1870)]. Under *U. S. Code* Title 46, Section 186, an owner *pro hac vice* within the meaning of the provision relating to limitation of liability, is one who shall "man, victual and navigate such vessel at his own expense". Both the Fleet Corporation and the Consolidated Navigation Company are owners *pro hac vice* within these definitions.

It is certain that the Fleet Corporation and the so-called agent, together, absolutely controlled the operation of the ship and manned, victualed and navigated such vessel at their own expense. Also they shared in the profits, for under Section 11 of the operating agreement it is stated that the agent is to get as compensation a percentage of the gross freight inward and outward, and of the passenger revenue.

[In discussing the operating agreements our references to sections are to the operating agreement in the *Lustgarten* case, beginning on page 177, the operating agreement not having been printed in the *Johnson* case, but being in the possession of the Government and covered by stipulation as to Exhibits—Johnson, R. 68, 183].

While the operating agreement refers to the fact that the Navigation Company is to pay the expenses and charge the same to the account of the owner, (Sections 3 and 4) the other terms of the contract make it clear that these expenses were to be paid by the Fleet Corporation as the agreement required that the moneys which the agent collected were to be deposited in a bank named by the Fleet Corporation, and subject to the con-

trol of the Treasurer of the Fleet Corporation. [Section 9]. These monies were not to be paid directly into the Treasury of the United States and it is clear that it is the Fleet Corporation who was to reimburse the agent for the expenses it incurred in operating the ships.

By separating its duties and functions, and delegating part of them to an agent, the Fleet Corporation cannot escape the liability of an owner *pro hac vice*. It shared the management of the ship, the contract having provided that the management, operation and conduct of the business of the vessel should be under the supervision and direction of the Fleet Corporation. [Sections 1 and 2]. The route or trade name of the ship was to remain the property of the owner. (Section 17).

With respect to the liability of the Fleet Corporation to judgment in these cases, it is rather unimportant to determine whether the Consolidated Navigation Company was an owner *pro hac vice*. If it was such owner, the Government recognizes its obligation to reimburse the Navigation Company, saying: "The Government would have to reimburse the Navigation Company if it should be compelled to pay any damages for personal injuries incurred in the operation of these vessels, under the circumstances presented in the instant case." [Pages 28 and 29 of the Government's Brief, *Lustgarten* case].

It seems, however, that the Navigation Company was also an owner *pro hac vice*, as it agreed to manage, operate and conduct the business of the vessel, [Sections 1 and 2]; to man, equip, victual and supply the vessel, [Section 3]; and to maintain the vessel in good repair [Section 4]; and it rendered itself individually liable for the expenses. [See the payrolls, not printed in the record, but covered by stipulation as to Exhibits], although it was entitled to reimbursement from the Fleet Corporation.

These operating agreements of the Fleet Corporation have been judicially construed on several occasions, and the charterer, as well as the Fleet Corporation, both with respect to contract and tort liability, have been held to a joint liability, as owners *pro hac vice.* [*Greenwald* v. *Fleet Corporation,* 16 F. (2d) 948, 951 (1927); *Cox* v. *Lykes Bros.,* 237 N. Y. 376, 383 (1924); *Stewart* v. *Fleet Corporation,* 7 F. (2d) 676, 678 (1925); *Fleet Corporation* v. *O'Shea,* 5 F. (2d) 123, 124 (Ct. of Appeals, Dist. of Col., 1925)].

As such owner *pro hac vice,* the business upon which the Fleet Corporation and/or the so-called agent were engaged at the time the wrongs sued upon in these common law actions were committed, was their own business, not that of the United States. Each was acting for itself alone. Between them they had possession and control, complete and unrestricted. The contracts of employment were their contracts; the stores, their stores; the payments for wages, as well as for other expenses, their payments; their own profit and their own losses.

We find in this operating agreement, the answer to the entire argument of the Government to the effect that the Fleet Corporation at the time the injuries sued for in these two cases were received, was acting as a public agent of the United States.

V. The Fleet Corporation is very particular to draw attention to the fact that the name of the United States is signed to the operating agreement. What the Fleet Corporation does not do is to show its authority for so signing the name of the United States to this agreement.

The records in the *Johnson* and *Lustgarten* cases do not contain a particle of evidence showing the authority of the person who signed the name of the United States to the operating agreements, or by what authority they were signed. It is not even shown who the person was who signed the name of the United States to that contract.

We submit that there is no authority in any of the statutes relating to the Fleet Corporation or to the merchant fleet enterprise, which confers this authority on the Fleet Corporation to so bind the United States. "A corporation as such has no authority to sign the name of its stockholder to a contract and bind him as sole or joint obligor." [*Tabas* v. *Fleet Corporation*, 22 F. (2d) 398, 400 (C. C. A. 3, 1929), *United States* v. *Strang*, 254 U. S. 491, 493 (1920)].

The Merchant Marine Act of 1920 authorizing the operation of merchant vessels by the Fleet Corporation must be construed in the light of the fact that under a similar authorization conferred by the Shipping Act of 1916, the Fleet Corporation had operated the ships not merely as an agent, but as an absolute owner or as an owner *pro hac vice*. The Merchant Marine Act must have been passed with the knowledge of this fact, and no attempt was made in the act to change the character of the operation of the ships from that of the individual private business of the Fleet Corporation to that of an agency in such business for the United States.

The operating agreements in these cases were nothing more than a screen of words under which the Fleet Corporation endeavored to shirk the responsibilities which Congress very plainly desired to impose upon it.

POINT TWO.

IT IS NOT AN EXCLUSIVE REMEDY THAT IS GIVEN AGAINST THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION BY THE SUITS IN ADMIRALTY ACT OF MARCH 9, 1920, FOR LIABILITY OF THE FLEET CORPORATION GROWING OUT OF THE OPERATION OF MERCHANT VESSELS OF THE UNITED STATES, AND DOES NOT BAR THE COMMON LAW ACTIONS INSTITUTED IN THESE TWO SUITS.

I. The Suits in Admiralty Act should be construed in harmony with the later act of June 5, 1920, the Merchant Marine Act, and so as to sustain the present common law actions *in personam* brought against the Fleet Corporation.

It is important to state the particulars of the two acts, of the Suits in Admiralty Act and the Merchant Marine Act. The Suits in Admiralty Act was Senate Bill 3076, approved March 9, 1920, and is Chapter 95 of the Laws of the Sixty-Sixth Congress, Second Session, (41 Stat. 525-528). It is also to be found in *U. S. Code,* Title 46, Sections 741 to 752 inclusive. The Merchant Marine Act was House Resolution No. 10378, approved June 5, 1920, and is Chapter 250 of the Laws of the Sixty-Sixth Congress, Second Session, (41 Stat. 988-1008). Its provisions are variously distributed in the U. S. Code. [*U. S. Code,* Title 46, Sections 13, 597, 599, 688, 802 to 805, 808, 812, 813, 861 to 889, 911, 921 to 927, 941, 951 to 954, 961, 971 to 975, 981 to 984.] The Suits in Admiralty Act was first proposed to Congress in the Senate September 25, 1919, whereas the Merchant Marine Act was not introduced until about two months later, November 5, 1919, when it was pre-

sented in the House. (See Histories of Merchant Marine Act and Suits in Admiralty Act, Appendix, pages 3 and 5).

Section 18 of the later act, [*U. S. Code,* Title 46, Section 808], reenacted word for word the former Section 9 of the Shipping Act of 1916.

For convenience we place together the exclusive language of the Suits in Admiralty Act and the pertinent language of Section 18.

> "No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel *in personam,* be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this chapter shall not apply to the Panama Railroad Company. (Mar. 9, 1920, c. 95, Sec. 1, 41 Stat. 525.)"
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> * * * * * * * *
>
> "Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. (June 5, 1920, c. 250, Sec. 18, 41 Stat. 994)."

It was this former Section 9, now Section 18, under which vessels of the United States, operated by or through the Fleet Corporation, were held subject to judicial process *in rem* in the case of *The Lake Monroe,* 250 U. S. 246 (1919). It was the inconvenience of such seizures and the desire to be rid of the same, which was the main purpose behind the passage of the Suits in Admiralty Act. [*Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 686, 691 (1926); *Blamberg Bros.* v. *United States,* 260 U. S. 452, 458 (1923)].

Section 13 of the Suits in Admiralty Act, (a provision not found in the U. S. Code), repealed all prior inconsistent acts, but Section 13 of course had no application to Section 18, passed two months later.

In re-enacting Section 9 providing that these vessels were to be subject to the liability of merchant vessels generally, notwithstanding the fact that there had intervened the Suits in Admiralty Act, Congress plainly indicated that it regarded this section as having a scope extending beyond any question of its being limited to applying only to remedies *in rem,* and showed a continuing intention to place the Fleet Corporation, as nearly as possible AND its vessels, on the same general basis as private shipping companies operating private merchant vessels.

The later act, the Merchant Marine Act, was a general act consisting of thirty-nine sections, revising previous laws with relation to the American Merchant Marine besides dealing particularly with the United States Shipping Board Emergency Fleet Corporation.

A most important change was made by this Merchant Marine Act in the Seaman's Law at this time, 1920, when in Section 33. it amended Section 20 of the Act

of March 4, 1915, so as to give any seaman suffering personal injuries *an action for damages at law with the right of trial by jury.* Nothing was said with respect to any limitation of this right where the cause of action was against the Fleet Corporation, and it would seem, therefore, that in view of Sections 18 and 33 of the subsequent Merchant Marine Act, that Congress intended that the Suits in Admiralty Act should be subject at least, to sufficient construction in lessening its exclusive features so as to permit the present common law actions against the Fleet Corporation to be maintained.

Since both acts refer in substance to the same subject, and were passed at the same Session of Congress, the sections may be held to be in *pari materia* and are to be construed harmoniously, if possible, but if that is impossible, the Merchant Marine Act being later in point of time controls. [*Frost* v. *Weenie,* 157 U. S. 46, 58 (1894); *Lewis Sutherland Statutory Construction,* 2nd Ed., Section 349].

The reasonable construction of the two statutes is that the Suits in Admiralty Act is a permissive statute relating only to causes which suitors may wish to institute by libel on the Admiralty side of the court.

In Section 2 of the Suits in Admiralty Act it is stated that "a libel *in personam may* be brought". We emphasize "may".

The test of the bringing of such action is also stated in Section 2 to be whether a "proceeding in Admiralty could be maintained". The common law action is not referred to.

It is reasonable to conclude that the Act was intended to be permissive as to the privilege of a suitor to go either into the admiralty courts or into the common law courts, and exclusive only of the remedies of the suitor in the event he elected to proceed in admiralty.

The wrongs suffered by *Johnson* and *Lustgarten* gave them in addition to the common law remedy, a proceeding by way of libel on the Admiralty side of the Court *in personam.* [*Leathers* v. *Blessing,* 105 U. S. 626, (1881); *The Iroquois,* 194 U. S. 240 (1904)]. In other words, if they had chosen to go into the Admiralty side of the Court to redress their wrongs, they could only have had the remedy *in personam,* provided by the Suits in Admiralty Act.

II. The right to sue the Fleet Corporation at common law with the right of trial by jury, has been saved to the present plaintiffs by the Saving Clause in the Judiciary Act and by the *Seventh Amendment* to the *Constitution* and such a construction of the Suits in Admiralty Act which would render it unconstitutional *or even create a doubt as to its unconstitutionality* should be avoided. [*Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 390 (1923)].

The common law remedy was in existence before the passing of the Judiciary Act [*Story Commentaries on the Constitution,* 4th Ed.; Sec. 1672, Note 4; *The Hamilton,* 207 U. S. 398, 404 (1907)], and the Seventh Amendment which was proposed for adoption by Congress at the same time that the Judiciary Act was passed, conferred the right of trial upon this pre-existing remedy.

In saving the common law remedy in 1789, Congress saved it because it could not and it deemed it could not have taken it away.

The first Congress in the Judiciary Act of 1789 in dealing with all cases of Admiralty jurisdiction *saved to suitors in all cases* the right of a common law remedy where the common law was competent to give it. [1 Stat. 76, 77; *United States Code,* Title 28, Sections 41 and 371].

With common law remedies thus protected and saved, the present common law action was brought against the Fleet Corporation *in personam* for a maritime tort. The plaintiffs had this common law remedy because the common law was competent to give it. [*Steamboat Co.* v. *Chase,* 16 Wall. 522, 533 (1872)].

By proceeding at common law these plaintiffs had as part of the remedy, the right of trial by jury. [*Chelentis* v. *Luckenbach Steamship Co.,* 247 U. S. 372 (1917); *Philadelphia R. R. Co.* v. *Berg,* 274 Fed. 574 (C. C. A., 3, 1921); *Bonham* v. *Southern Menhaden Corp.,* 284 Fed. 362 (D. C., S. D. Fla., 1922)].

Congress has no right to declare that a citizen shall be deprived of a common law action and the right of trial by jury which he has concurrently with a remedy *in personam* in Admiralty against the Fleet Corporation, by declaring that he must proceed, if at all, only in admiralty and without right of trial by jury. So construed, Congress would be taking away a right of trial by jury in a field of remedial law over which capacity to so legislate was reserved from it by the *Seventh Amendment,* and the constitutionality of the Suits in Admiralty Act would be placed in grave doubt.

Congress, it is conceded, could take away a remedy in the nature of a right of trial by jury, if Congress had created it. Congress could also create an exclusive remedy in connection with new substantive rights, in the Admiralty Courts because of the grant of jurisdiction in *Section 2, Article III of the Constitution, Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 386 (1923), but here the right involved has been reserved from the province of Congress by the *Seventh Amendment.*

Congress "saved" the common law remedy in actions for maritime torts, but this was merely "abundant caution" on the part of Congress. [Chief Justice Nelson on page 390, *New Jersey Steam. Navigation Co.* v. *Merchants Bank,* 6 How. 344 (1848)].

III. In the cases in which this Court has had occasion to construe the Suits in Admiralty Act, of which the principal cases are in the reverse order of their determination: *Fleet Corporation* v. *Rosenberg,* 276 U. S. 202 (1928); *Eastern Transportation Co.* v. *United States,* 272 U. S. 675 (1926); *Nahmeh* v. *United States,* 267 U. S. 122 (1925); *Shewan & Sons* v. *United States,* 266 U. S. 108 (1924); *Blamberg* v. *United States,* 260 U. S. 452 (1923), there has not been presented the point now in issue, as to whether apart from the Suits in Admiralty Act and at common law, the Fleet Corporation may be sued for its maritime torts, *nor has there been presented the question as to what has been the effect upon this Act of Section 18 of the later Merchant Marine Act.*

In the case of the *Fleet Corporation* v. *Rosenberg,* 272 U. S. 202 (1927), the case most nearly bearing upon

the present subject, the Court was studious to reserve decision upon the point of exclusive remedy presented in these two common law actions. There is nothing, furthermore, inconsistent between the decision in the *Rosenberg* case and the decision which we ask the Court to make in this instance. In the *Rosenberg* case, it was decided that the Suits in Admiralty Act excluded the former remedy *in personam* which existed against the Fleet Corporation under the General Maritime Law. Rosenberg Brothers lost because this action was not commenced within the two-year period of limitations.

Primarily the Court relied upon a strict construction of the Suits in Admiralty Act, and Rosenberg Brothers having chosen the Admiralty remedy, were forced to take that remedy with the restrictions which Congress had placed upon it.

Neither counsel nor the Court in the *Rosenberg* case considered the Suits in Admiralty Act with reference to the later Merchant Marine Act and the reincorporation of former Section 9 of the Shipping Act of 1916, and former Section 20 of the Act of March 4, 1915.

The brief of counsel for Rosenberg Brothers (see p. 24) in discussing this point, was principally concerned with an effort to get around Section 13 of the Suits in Admiralty Act, seemingly by oversight making no mention anywhere of Section 18 of the Merchant Marine Act. That counsel for Rosenberg Brothers was not successful in this effort, and that the Court did rely upon Section 13, is evidenced from the opinion of the Court in this case on page 214.

We claim that the question now before the Court is a question of the general policy behind the enactment of the Suits in Admiralty Act, and is therefore not to be restricted by anything decided in the *Rosenberg* case.

The *Rosenberg* case, as well as the case of *Eastern Transportation Co.* v. *United States*, 272 U. S. 675 (1926) were both cases of particular application. This Court remarked in the latter case on page 692 that there was nothing inconsistent in the decision there with the declaration as to the main purpose of the act as stated in the previous cases of *Shewan & Sons* v. *United States*; *Nahmeh* v. *United States* and *Blamberg* v. *United States*; such main purpose being the substitution of an Admiralty remedy *in personam* against the United States for a previously existing Admiralty proceeding *in rem* against merchant vessels of the United States.

No other purpose appears from the reports of the committees in charge of the passage of the Suits in Admiralty Act in Congress (see Appendix, pp. 7 and 8).

That there was no intention on the part of Congress of any such governmental purpose is very clear from the remarks of Senator Jones, Chairman of the Senate Committee in charge of the bill in explaining its provisions before the Senate (Appendix, p. 10). See History of Suits in Admiralty Act (Appendix, p. 5).

In none of the cases in which this Court has construed the Suits in Admiralty Act has the attention of the Court been drawn to the force which that act has in the light of the subsequent passage of Section 18 of the Merchant Marine Act.

IV. "The complete system of administration" although possibly a valid argument for the uniformity of the Admiralty remedy and administration provided for in the Suits in Admiralty Act, is, we submit, no argument in favor of a deprivation of a previously existing action at common law.

It is rather opposed to the exclusive construction. Section 4 of the Act, which limits the rate of interest to 4%, which judgments shall carry instead of the 6% rate of interest existing at common law in New York, is an additional taking away of a right and an additional argument for strict construction.

If a greater interest were to be given upon a judgment obtained against the Fleet Corporation in Admiralty than obtains at common law, or a broader remedy as to the Fleet Corporation than the one previously existing, it might be supposed that this was given in consideration of the forbearance of the common law action. There would be some *quid pro quo;* some natural justice in such a situation. [*Amstein* v. *Gardner,* 134 Mass. 4 (1883)].

A broadly exclusive construction taking away a common law action is a step in the wrong direction and an infraction upon jealousy guarded private rights, which the people are not to be deemed to have surrendered. "Under our system the people * * * are the sovereign," Mr. Justice Miller in *United States* v. *Lee,* 106 U. S. 196, 208 (1882).

The fact that the Attorney General is required under Section 12 of the Suits in Admiralty Act to report to Congress all suits under the act in which final judgments shall have been rendered, is, we submit, no argument for depriving citizens of their right to maintain common law actions. The Attorney General is not directed to report to Congress final judgments in suits involving land tort liabilities of the Fleet Corporation.

Nor is there any mention made with relation to judgments in other common law actions against the Fleet

Corporation; the reason no such reports of such judgments were required is obvious. The Suits in Admiralty Act deprived persons in dealing with the Fleet Corporation of the right of seizure of its ships and Congress wished to provide a speedy manner of securing payment of judgments recovered in Suits in Admiralty. Therefore it provided (Section 8), that those judgments should be paid out of the Treasury of the United States without further legislative action on its part. It knew this type of case proceeding *in rem*, very well and it could provide in advance for the payment of judgments in such cases.

In the case of judgments other than those in admiralty, on the other hand, further legislation would be required to appropriate funds for the payment thereof, and it would at that time be apprised of such other judgments as might have been recovered.

There is also an important distinction between the authority of the Attorney General to conduct the defense of a suit in admiralty against the United States and a similar authority with respect to actions at law against the Fleet Corporation.

The authority of the Attorney General to conduct the defense of these suits against the Fleet Corporation, not instituted in Admiralty, and to report the final judgment in such suits to Congress, is open to considerable question. Although the Attorney General does have general authority to appear for the United States where the United States is interested [R. S. Sections 359 and 367 U. S. Code Title 5, Sections 309, 316], yet the Fleet Corporation and the United States are separate and distinct parties and it is submitted that it was expected that the Fleet Corporation was to have its own counsel and was not to rely upon the Department of Justice for its legal services.

The Merchant Marine Act of June 5, 1920, in Section 3a [41 Stat. 988 at p. 990], specifically authorized the Board to employ such attorneys as it finds necessary for proper legal services.

It is reasonable to conclude that Congress intended the Fleet Corporation to function independently of any Governmental department, except in so far as it was absolutely necessary to protect the remedy *in personam* given against the United States, and in giving protection from seizure of the ships of the United States under Admiralty process *in rem*.

V. Construed as depriving the present plaintiffs of their common right to bring a common law action for a maritime tort against the Fleet Corporation, the act should be strictly construed with reference to a deprivation of the plaintiff's present common right, and no meaning should be given to it not within its express words.

This is not analogous to the situation in which a statute creates a right and provides a remedy, and such remedy is held to be exclusive. [*Barnet* v. *National Bank*, 98 U. S. 555, 558, (1878)]. This rule may apply, it is not conceded that it does, to suits against the United States. It should not apply to the Fleet Corporation, the defendant in these actions.

Here the remedy, the action at common law, was concurrent with the proceeding in Admiralty, even before the adoption of the Constitution, and the Judiciary Act of 1789. *Justice Story* considered that the common law remedy for maritime torts was concurrent with the Admiralty remedy and that, the exclusive jurisdiction clause

in the *Constitution, Article 3, Section 2,* was correctly construed to recognize it. (*Story Commentaries on the Constitution,* 4th ed., Sec. 1672, Note 4); See *The Hamilton,* 207 U. S. 390, 404 (1907)). The Fleet Corporation, as we have shown in Point One, has always been suable for its torts and the torts of its agents done in connection with its proprietary business, of operating merchant vessels.

The situation here is that of a statute which the Government attempts to construe as depriving suitors against the Fleet Corporation of a previously existing common law action, giving them in exchange a remedy by way of a libel *in personam* against the Fleet Corporation, which they already had, and a remedy by way of a libel *in personam* against the United States, whereas they already had a remedy substantially against the United States by way of a libel *in rem* against its vessels.

The construction that the Suits in Admiralty Act is exclusive of the present common law suits against the Fleet Corporation which have proceeded in the Federal courts, must also, of course, by the same process of reasoning, exclude common law suits against the Fleet Corporation brought in state courts, and the absurdity of the contention is clear in the face of the conceded province of state legislatures to control the remedies in state courts upon maritime matters. [*The Hamilton,* 207 U. S. 398, 404 (1907)].

If this statute is to be construed as one in derrogation of pre-existing rights, it must be strictly construed.

It has been so construed. [*Fleet Corporation* v. *Texas Star Flour Mills*, 12 F. (2d) 9, 12 (C. C. A., 5, 1926); *Wallace* v. *Fleet Corporation*, 5 F. (2d) 234, 236 (1925); *Wright* v. *Fleet Corporation*, 285 Fed. 647, 649 (D. C., S. D. N. Y., 1922)].

In giving the right to libel *in personam* against the United States it is conceded a remedy was given which did not exist before, but there were no express words in the act to the effect that this was in lieu of a pre-existing common law action against the Fleet Corporation,—*such an important change should not be left to implication.* [*Jackson* v. *S.S. Archimedes*, 275 U. S. 463, 467 (1928); *Lewis Sutherland Statutory Construction*, 2d Ed., Sec. 720].

The statute may have been intended to be exclusive with respect to remedies in Admiralty but in the absence of words expressly negativing the common law remedy, especially with respect to the Fleet Corporation, the common law remedy should be presumed to be cumulative and not within the scope of the act. [*Shaw* v. *Railroad Co.*, 101 U. S. 557, 565 (1879)].

Congress merely stated that no vessels owned by the United States or the Fleet Corporation should be subject to arrest and seizure by judicial process.

Congress refrained from stating that no common law action should be brought against the Fleet Corporation for causes of action growing out of its shipping operations. The Fleet Corporation is here asking the court judicially to legislate. They should go back to Congress.

VI. The maintenance of the present actions does not conflict with the terms of the Suits in Admiralty Act. The plaintiffs have not asked for process against the

vessels of either the United States or the Fleet Corporation.

The plaintiffs may be prevented from enforcing a judgment by an execution against a vessel of the Fleet Corporation or the United States, but that has nothing to do with the maintenance of the present common law actions and the recovery of judgment. [*Sloan Shipyards* v. *Fleet Corporation*, 258 U. S. 549, 568 (1922); *Workman* v. *City of New York*, 179 U. S. 552, 565 (1900); *American Cotton Oil Co.* v. *Fleet Corporation*, 270 Fed. 296 (D. C., E. D. La., 1921)].

The consequences of the deprivation of the right to proceed at common law against the Fleet Corporation for a maritime tort, would be that suitors suffering a tort on land may sue at common law and have a jury trial, but persons suffering a tort at sea must sue by libel *in personam* without the right of trial by jury, although each may have asked only for a judgment *in personam*. The lack of sound distinction is plain and without natural justice to support it.

VII. In view of the organization of the Fleet Corporation as a private corporation with proprietary duties to perform, and its consequent liability as explained in Point One, it is not to be presumed that the only remedy by which such liabilities may be adjusted is a libel *in personam*, under the Suits in Admiralty Act. No other private corporation in the same line of business would be so restricted.

The history of the organization of the Fleet Corporation shows that it was intended to resort to the same

courts as any other private shipping company. Otherwise, an unequal basis of competition is established, unfair to private owners, and in many respects disadvantageous to the Fleet Corporation.

If the principle of the exclusiveness of the remedy applies to invitees and employees as in the *Johnson* and *Lustgarten* cases, then it applies equally well to passengers and contractors of all kinds having claims of a maritime nature. In all of these cases the restriction upon the remedy for adjusting business casualties must be, to a certain extent, hampering to the business of the Fleet Corporation, and against its own best interests.

The presumption is against the exclusiveness of the remedy with respect to a Government instrumentality engaging upon a commercial enterprise. The reasons for such presumption are ably stated in the opinion of Mr. Justice Allen, commencing on page 4, in the case of *Amstein* v. *Gardner,* 134 Mass. 4 (1883). As it was said by Judge Learned Hand, now of the Circuit Court of Appeals for the Second Circuit, but then District Judge, in the case of *Gould Coupler Co.* v. *Fleet Corporation,* 261 Fed. 716 (D. C., S. D. N. Y., 1919): "I have no disposition to strain the point in their favor."

The courts have judicially recognized that in entering upon commercial ventures it is highly desirable that the Fleet Corporation as a governmental agency, should be subject to the same tribunals as other persons similarly employed. [*Haines* v. *Lone Star Shipbuilding Co.,* 268 Pa. 92, 100 (1920)].

POINT THREE.

THE TWO YEAR PERIOD OF LIMITATIONS PRESCRIBED IN THE SUITS IN ADMIRALTY ACT IS NOT APPLICABLE TO THE LAW ACTION IN THE JOHNSON CASE.

I. Assuming that the Suits in Admiralty Act is not exclusive of the common law remedy saved to suitors under the Judiciary Act, the two-year period of limitations by its express terms would not be applicable to the Johnson action.

As stated in the United States Code Title 46, Sec. 745 this period of limitations which is contained in Section 5 of the Act (41 Stat. 526) states that: "Suits as herein authorized shall be brought within two years after the cause of action arises". "Suits as herein authorized" would not include a common law action. [*John G. Wright & Co.* v. *Fleet Corporation,* 285 Fed. 647 (D. C., S. D. N. Y., 1922)].

In bringing his common law action thirty-one months and twenty-three days after receiving his injuries, Johnson did not avail himself of the remedies provided for by the Suits in Admiralty Act. Not being a seaman as defined by the Jones Act neither did he have the remedy of *Section 33 of the Jones Act,* both of which acts have a two-year limitation clause.

Neither was the cause of action with which he went into the common law court created by either the Merchant Marine Act or the Suits in Admiralty Act. The liability of the Fleet Corporation arose out of the Shipping Act of 1916. The action of money damages for personal injuries is a transitory action at common law. The present common law action was therefore not in the category of "suits as herein authorized".

In the forum which Johnson chose to redress his wrongs, the Supreme Court of New York, there was a statute of limitations of three years. [*N. Y. Civil Practice Act,* Section 49].

When the action was later removed to the federal courts, it was still a common law action proceeding according to the mode of procedure in similar cases in the New York Supreme Court and subject to the same New York three-year statute of limitations [Act of Sept. 24, 1789, Ch. 20, Sec. 34; U. S. Code, Title 28, Section 725; *Leffingwell* v. *Warren,* 2 Black, 599 (1862)].

The Fleet Corporation being a private business corporation, the presumption is against the application of the two-year period of limitations. [*Stewart* v. *Fleet Corporation,* 7 F. (2d) 676, 679 (D. C., E. D. N. Y., 1925)].

II. The lower court of common law in trying the action which Johnson had brought under the Saving Clause, and at common law, was required to apply only the substantive and not the procedural maritime law. The two-year period of limitations being procedural and not substantive maritime law, its provisions could not have been enforced in the present common law action any more than the action itself could have been begun by the issuance of process *in rem* against the ship. [*The Moses Taylor,* 71 U. S. 411, 428 (1866)].

The cases cited by the Government for a contrary principle, [*Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 243 (1921) and *Engel* v. *Davenport,* 271 U. S. 33, 39 (1926)] are instances in which the statute limiting the remedy created both the remedy and the liability. This

is not the case here, as we have explained in Points One and Two. The responsibility of the Fleet Corporation was created in the act of its organization.

This court has frequently held that a statute passed in limitation of a liability which it does not create, as to personal actions at least, applies only to the remedy, and not to the right. [*Michigan Insurance Bank* v. *Eldred,* 130 U. S. 693, 696 (1888); *Townsend* v. *Jamieson,* 9 How. 407, 413 (1850)]. These were cases in contract but the same principle obtains in transitory actions of tort for personal injuries. [*Nonce* v. *Richmond & D. R. Co.,* 33 Fed. 432, 439 (C. C., W. D. N. C., 1887); *Bonhan* v. *Southern Menhaden Corp.,* 284 Fed. 362, 364 (D. C., S. D. Fla., 1922); *Krogg* v. *Atlanta Railroad,* 77 Ga. 202, 215 (1886)]. The two year period of limitation, here, then, limited only the remedy provided by the act of which it was a part.

The two-year limitation period, therefore, must be construed as not limiting the liability of the Fleet Corporation, in actions at common law but only limiting the time within which remedies provided for by the Suits in Admiralty Act could be availed of. With respect to the common law remedies enforced in the present actions, it had no application.

POINT FOUR.

NONE OF THE DEFENSES WITH RESPECT TO THE JOHNSON CASE NOR THE DEFENSE OF THE EXCLUSIVENESS OF THE REMEDY UNDER THE SUITS IN ADMIRALTY ACT AS IT APPLIES TO THE LUSTGARTEN CASE, IS PROPERLY BEFORE THIS COURT FOR ARGUMENT.

I. The chief objection we have under this head to the assertion of these defenses in this court is that counsel

for the Fleet Corporation themselves seemed to regard them as of no importance in the lower courts, and thus we have an almost complete lack of proof in this court upon which to base an intelligent discussion.

If at the time the injuries occurred in these two cases it was acting in the capacity of a public agent of the United States, that was a matter of fact for the Fleet Corporation to prove and it has not done so. [*Fleet Corporation* v. *Sullivan*, 261 U. S. 146 (1922)]. The court is simply limited by the record.

II. It is not merely a matter of insufficient attention to the facts either, for no motions and no requests to charge, and no exceptions to rulings were made with respect to these defenses. The entire emphasis of the Government's case upon the trial of both cases was upon the facts of negligence and damage with the single exception of the argument for public agency, the first of the defenses made in the *Lustgarten* case.

In the *Johnson* case, see motions at close of plaintiff's case (R. 92) and at the close of the whole case (R. 167), it was assumed at the trial during a colloquy between the court and counsel that the S. S. "Jacksonville" was being operated under a managing operator's agreement between the Fleet Corporation and the American Shipping Company (R. 56, 57, 68) and the trial was allowed to proceed without objection or exception. There was no argument at that time as to the three defenses now advanced.

In the *Lustgarten* case there was no exception, no motion in the trial court, and no assignment of error with respect to the defense of the exclusiveness of the remedy in the Suits in Admiralty Act. See motions at the close of plaintiff's case (Lustgarten R. 142, 143, 169),

and motions at the close of the whole case (Lustgarten R. 170).

The situation in the *Lustgarten* case is the same as that which confronted Judge Swan in *Smith* v. *Fleet Corporation,* 26 F. (2d) 337, 339, (C. C. A. 2, 1928) when he said in refusing to consider a belated defense of the Fleet Corporation under U. S. Code Title 31, Section 203: "This question was not presented to the trial court, was not covered by an assignment of error and was first suggested in appellant's reply brief."

CONCLUSION.

THE JUDGMENT IN THE LUSTGARTEN CASE SHOULD BE AFFIRMED AND THE JUDGMENT IN THE JOHNSON CASE SHOULD BE REVERSED AND A NEW TRIAL GRANTED.

Respectfully submitted,

SILAS B. AXTELL,
Attorney for Petitioner, Johnson and Respondent, Lustgarten.

C. ALEXANDER CAPRON,
MYRON SCOTT,
CHALLEN B. ELLIS,
Of Counsel.

(The italics in this brief are our own.)

Appendix.

CHARTER OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION (from Records on Appeal filed in this Court, Vol. 121 of October Term 1921, page 34 of Record. Sloan case):

"CERTIFICATE OF INCORPORATION

—of—

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, a majority of whom are residents of the District of Columbia desiring to form a corporation under sub-chapter four (4) of the incorporation laws of the District of Columbia, and in pursuance of section eleven (11) of an Act of Congress entitled, 'An Act to Establish a United States Shipping Board', approved September 7, 1916, do hereby certify:

First. That the corporate name of this company shall be United States Shipping Board Emergency Fleet Corporation, and the object for which it is formed is the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States, and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the *efficient and profitable conducting of said business,* as authorized by the

laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia, upon corporations under said subchapter four (4) of the corporation laws of the District of Columbia.

Second. The existence of this corporation shall be perpetual.

Third. That the capital stock of this corporation shall be Fifty Million Dollars ($50,000,000) divided into shares of the par value of One Hundred Dollars ($100) each.

Fourth. That the number of trustees who shall manage the concerns of the company for the first year, or until their successors are elected, a majority thereof being citizens of the District of Columbia, shall be seven (7).

George W. Goethals, 43 Exchange Place, New York, N. Y.

William Denman, 1070 Merchants Exchange Bldg., San Francisco, California.

John A. Donald, 18 Broadway, New York, N. Y.

William L. Solean, 1361 Harvard Street, N. W. Washington, D. C.

Richard H. Bailey, Jr., 1439 Fairmount Street, N. W. Washington, D. C.

Timothy C. Abbott, 2023 Park Road, N. W. Washington, D. C.

Ellsworth P. Bertholf, 1463 Harvard Terrace, Washington, D. C.

The Board of Trustees, by the affirmative vote of a majority of the whole board may appoint from the trustees or executive committee of three (3) members, and a Transportation Committee

of three (3) members of which a majority shall constitute a quorum, and to such extent as may be provided in the by-laws such committee shall have and may exercise all or any of the powers of the Board of Trustees.

Fifth. That the place in the District of Columbia in which the operations of the company are to be carried on is at Munsey Building in the City of Washington, District of Columbia.

This corporation reserves the right to amend, alter or change any provision contained in this Certificate of Incorporation in any manner prescribed by statute, and all rights conferred on stockholders herein granted are subject to this reservation.

IN WITNESS WHEREOF, we have hereunto affixed our signatures and seals this 16th day of April, A. D. 1917.

WILLIAM DENMAN [seal]
JOHN A. DONALD [seal]
GEO. W. GOETHALS [seal]
T. C. ABBOTT [seal]
E. P. BERTHOLF [seal]
RICHARD H. BAILEY, JR. [seal]
WILLIAM L. SOLEAN [seal]

* * * * * * *

MERCHANT MARINE ACT HISTORY (H. R. 10378 Congressional Record Index, 66th Congress, 1st and 2nd Sessions):

Nov. 5, 1919—Referred to House Committee on Merchant Marine and Fisheries, 7998 (Mr. Greene);
Nov. 6, 1919—Reported back (House Rep. 443) 8052;
Nov. 8, 1919—Debated 8142-8173;

Nov. 8, 1919—Amended and passed House 8173;
Nov. 8, 1919—Referred to Senate Committee on Commerce 8267;
May 4, 1920—Reported with Amendments (Senate Report 573)—6494;
May 10, to
21, 1920—Debated: 6803-6816; 6857-6869; 6984-6994; 7036; 7043-7048; 7163; 7164; 7198; 7211; 7223-7227; 7274; 7291; 7293-7296; 7326; 7334; 7336-7346; 7347-7356; 7409-7420.
May 21, 1920—Amended and passed Senate 7420;
May 21, 1920—Senate requests conference with the House on the bill and amendments, and appoints conferees, 7420;
May 22, 1920—Conferees appointed for House, 7504;
June 2, 3, 1920—Conference report submitted in House (House Report 1093) 8290; 8398;
June 3, 1920—House insists upon its disagreement to the Senate amendments and asks further conference, 8398; 8412; 8442;
June 3, 1920—Conferees appointed, 8334; 8412;
June 2, 1920—Conference report submitted in Senate, 8163;
June 2, 1920—Debated 8182;
June 3, 1920—Senate insists upon its amendments and agrees to further conference, 8334;
June 3, 1920—Conference report submitted in Senate, 8338;
June 4, 1920—Debated, 8465-8470; 8489;
June 4, 1920—Agreed to 8470;
June 4, 1920—Conference report submitted in House (H. Rep. 1102), 8572;
" " " —House insists upon its disagreements to the Senate amendments and asks further conference, 8576;

" " " —Conferees appointed, 8487, 8576;
" " " —Senate further insists upon its amendments and agrees to conference, 8487;
" " " —Report submitted in Senate 8493;
" " " —Agreed to 8502;
" " " —Conference report submitted in House (H. Rep. 1107) 8588;
" " " —Debated, 8588-8609; 9360, 9367;
" " " —Agreed to, 8609;
" 5, " —Examined and signed, 8620, 8662;
" " " —Presented to President 8678.

HISTORY OF SUITS IN ADMIRALTY ACT (S. 3076). (Congressional Record Index, 66th Congress, 1st and 2nd Session):

Sept. 25, 1919, — Referred to Senate Committee on Commerce 5889 (Mr. Jones);
Sept. 27, 1919, — Reported back, (S. Rep. 223) 6017;
Oct. 22, 1919 — Debated, 7317, 7439, 7440;
" 24, " — Passed Senate, 7440;
" 25, " — Referred to House Committee on Judiciary 7538;
Dec. 12, 1919 — Reported with amendments (H. Rep. 497) 498;
Jan. 17, 1920 — Debated, 1678-1693;
" 19, 1920 — Debated, amended and passed House, 1750-1759;
" 20, 1920 — Senate disagrees to House amendment, appoints conferees, 1765;
" 21, 1920 — Conferees appointed for House, 1860;
" " " — House insists upon its amendments and agrees to conference, 1860;

Feb. 23, " — Conference report submitted in Senate, 3350;
March 1, " — Agreed to, 3690, 3691;
Feb. 28, " — Conference report submitted to House (H. Rep. 669), 3629.
" " " — Agreed to 3631
Mar. 4, " — Examined and signed, 3864, 3883;
" 9, " — Approved by the President—(Public, No. 156), 4068

REMARKS OF SENATOR JONES—(Congressional Record. V. 59, Pt. 7, 66th Congress, 2nd Session, page 7416):

"The bill is framed on the theory of getting the Government out of the shipbuilding and shipowning business, but it is not framed on the theory of getting the Government out of the shipbuilding and shipowning business at an undue sacrifice. I am just about as strongly opposed to that as is the Senator from Idaho (Mr. Nugent). We have tried to frame the bill in such a way as clearly to indicate to the Shipping Board that it is not the purpose of the bill, that it is not the intention of Congress, that they should sacrifice the interest of the people of the country in these ships simply to get them into private hands. We are not in favor of that. We do feel, however, that the people of the country want these ships ultimately to go into private hands; that that is the best way to build up and maintain an American Merchant Marine; but we realize that the shipping belongs to the Government. The situation confronting us is not like

the railroad situation, for the railroads belonged to private parties and the Government simply had possession of them, and of course we should turn them back as soon as possible. The Shipping Board fleet is the Government's property; it is not necessary to sacrifice it purely for the purpose of getting it into private hands; the committee is not in favor of doing it, and this bill is not framed on the theory of doing it." * * *

"It is not required to sell its ships immediately; it will put them on desirable routes and develop the business, and then it will sell the ships, and, in my judgment, will get every dollar out of them that it has put in and, in addition, will build up the trade of this country and establish the American Merchant Marine upon a permanent basis."

EXTRACT FROM HOUSE REPORT, No. 497, (66th Congress 2nd Session, submitted December 12, 1919 by the Committee on the Judiciary):

"The Government now has a very large number of vessels engaged both in foreign and domestic commerce. As a consequence some of them are constantly liable to be seized and detained for some reason or other. Almost daily such seizures occur, and under existing law there is no speedy remedy for their release. Whenever one is attached the negotiations that necessarily must follow occasion damages in large sums, as even a day's delay may mean the loss of two or three thousand dollars. The object of this bill is not to add to the liability of the Government, but to prevent the seizure and detention of our ships, so as to eliminate this unnecessary loss. Under mari-

time law jurisdiction is usually acquired by seizing the ship and detaining it until payment is made or a bond or stipulation furnished in lieu of payment. The bill provides a simple method of acquiring jurisdiction by service of process upon the United States and authorizes, as to ships seized in foreign countries, the giving of a bond or stipulation such as the courts there may require. It is believed that these provisions will greatly lessen the loss occasioned under the existing law.

The bill was originally drawn by one of the attorney for the Shipping Board, and at its direction. It has been carefully examined by the Attorney General and has his approval. It is strongly urged as emergency legislation greatly needed. A number of hearings were had in reference to this legislation, in which the committee was urged to modify the bill so as to authorize suits against the United States for damages occasioned by any public vessel, but as this would involve a radical change in the policy this Government has heretofore pursued, it was not deemed wise to embody the change in this bill. It might tend to materially delay passage of this legislation."

EXTRACT FROM SENATE REPORT NO. 223, (66th Congress, 1st Session, submitted Sept. 12, 1919, by the Committee on Commerce):

"The result of this is to subject the United States to unnecessary expense and its vessels to

great delays. This bill meets the situation by providing specifically for suits *in personam* against the United States and expressly prohibits suits *in rem* against its merchant vessels. The principal object of suits *in rem* is to insure the collection of the claim by subjecting the vessel to it. It is not necessary in the case of the United States, which is absolutely responsible, and under the bill ample provision is made for prompt payment of any claim found to be due."

EXTRACTS FROM HOUSE REPORT No. 1399, (66th Congress, 3rd Session, submitted March 2, 1921, by the Select Committee on United States Shipping Board Operations):

> "The board was authorized by the shipping act to form with a capital stock not exceeding $50,000,000 one or more corporations for the 'purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels for the commerce of the United States.' *The purpose of this authorization was to place on a competitive equality with private shipping, vessels operated under Government appropriations, by exempting the latter on the one hand from government restrictions not adapted to commercial practices, and by withholding from them on the other hand such special immunity in domestic or international law as is customarily associated with governmental activity.*"

REMARKS OF SENATOR JONES—(Congressional Record. V. 58, Pt. 7, 66th Congress, 1st Session, pages 7317, 7318):

"Mr. King. Mr. President, I should like to ask the chairman of the Committee on Commerce what change, if any, this bill makes in existing law. It seems to me that this measure ought to have gone to the Committee on the Judiciary. That committee is now considering a bill extending the jurisdiction of the district courts to hear causes of action against the Government of the United States, and it seems to me that this is legislation of the same character as that which is being considered by the Judiciary Committee.

Mr. Jones of Washington. Mr. President, I will say to the Senator that the purpose of the measure is this: Under the language of the shipping act the Supreme Court has held, in a recent case, that the ships of the Emergency Fleet Corporation for example, are subject to the application of the same remedies for damages that private ships are, and therefore if one of these Emergency Fleet Corporation ships, a ship of the United States, causes damage and is libeled, the ship is attached and held until bond is given. It seems that the officers of the ships have no authority to give bonds, and so the Government is put to a great deal of inconvenience and loss. The purpose of this bill is to avoid that by simply providing that persons having claims growing out of the action of these ships, instead of having a suit in rem against the ship, as they have against private ships, shall have a suit *in personam* against the United States, which everybody, of course, recognizes is perfectly good. That allows

the ship, then, to go on about its business. That is really the purpose of this bill, and while the bill is rather long and has to be in order to meet various situations, yet that is the principal purpose of it. It gives the consent of the Government to a suit *in personam* against it.

* * * * * * * *

Mr. Smith, of Georgia. I understand that the Senator from Washington agrees that the bill may go over.

Mr. Jones of Washington. Oh, yes; but I do hope Senators will look into it very carefully, because we are confronted with a very serious situation. I want to say that the Attorney General's office called me up day before yesterday, I think, and stated that there was a ship down in New Orleans that had been libeled and the court there refused to allow it to go. They have no way in which they can furnish bond unless they go out and arrange it in a roundabout way, as an accommodation for the Government on the part of somebody to furnish a bond so that this ship may go into commerce. That condition of things ought not to exist, of course, and we are trying to avoid it in the future."